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No. 83-983

in the

Supreme Court

of the

United States

OCTOBER TERM, 1983

REUVEN TAKO and JACKIE TAKO, his wife,
Petitioners

vs.

MAYER AND CIE, a German corporation,
and MAYER ROTHKOPF INDUSTRIES, INC.,
a foreign corporation

On Petition for Writ of Certiorari
To The District Court Of Appeal Of Florida
For The Third District

REPLY BRIEF OF PETITIONERS

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1. The Federal Question Was Timely Raised.

Respondents suggest that two of the cases relied on by Petitioners, *Brinkerhoff-Farris Trust & Savings Co. vs. Hill*, 281 U.S. 673, 50 S.Ct. 451, 74 L.Ed. 1107

(1930) and *Missouri ex rel Missouri Insurance Co. vs. Gehner*, 281 U.S. 313, 50 S.Ct. 326, 74 L.Ed. 870 (1930), are distinguishable from the instant case because the facts in those cases are different from the facts in the instant case. However, the *material* facts are indistinguishable—that all prior rulings by the same court were contrary to the rulings in those cases, and that therefore the Petitioners could not reasonably have anticipated the result. Therefore the application of the concepts of law espoused therein is proper.

Respondents have argued that merely because the issue of relation back of an amendment was clearly before both the trial and appellate courts, the decision of the District Court of Appeal could not have been unexpected and that therefore, raising the federal question on motion for rehearing was untimely.

Neither of the cases cited above so limit the exception set forth in those cases, as Respondents would have this Court believe. The controlling factor is not the nature of the issue before the state court prior to the unexpected ruling; rather, the controlling factor is whether the ruling should have been anticipated. Conspicuously absent in Respondents' brief is any comment regarding this Court's summation of the exception as stated in *Herndon vs. Georgia*, 295 U.S. 441, 55 S.Ct. 794, 79 L.Ed. 1530 (1935).

Respondents have stated that "[t]he only thing in the District Court's per curium affirmance which Petitioners did not anticipate was that they did not prevail".[1] Whether Petitioners *did not* anticipate the

[1]Brief of Respondents at page 17.

decision and loss is irrelevant. Rather, under the exception permitted by the authorities cited, the controlling principal is whether the Petitioners *should have* reasonably or fairly anticipated the decision.

In the instant case, the District Court of Appeal in affirming the summary judgment against Petitioners, ruled in diametric opposition to its prior decisions as well as the decisions of the State Supreme Court, and even of the United States Supreme Court.[2] Certainly it cannot reasonably be said that Petitioners should have anticipated such an unprecedented ruling, and therefore the Federal question was timely raised.

2. **Jurisdiction Of This Court Is Proper.**

Mayer and Cie and Mayer Rothkopf Industries, Inc. brazenly suggest " . . . that it would be inappropriate for this court to exercise its discretionary jurisdiction to review a state appellate court's decision which is a per curium affirmance, without opinion, of the trial court's order."[3]

Throughout its history, this court, as in *Brinkerhoff-Faris Trust & Savings Co., supra*, has found certiorari jurisdiction proper to review state court decisions without written opinion. Notwithstanding this Court's time-honored practice, the only basis on which Respondents Mayer and Cie and Mayer Rothkopf Industries, Inc. claim that this case does not give rise to a substantial

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[2]See footnote 5 and cases cited at page 17 of the Petition for Writ of Certiorari.

[3]Brief of Respondents at 17, 18.

federal question is that it comes to this court from a decision without written opinion. Clearly, in light of this court's history of accepting certiorari jurisdiction on cases coming to it from decisions without written opinion, Respondents' position is untenable.

3. The Decision Of The District Court Of Appeal Unconsitutionally Denied Petitioners Equal Protection And Due Process.

Respondents suggest that merely because there are no Florida cases factually identical with the instant case, there can be no denial of equal protection. This is simply not true. There is but one rule of procedure in Florida regarding the relation back of amendments;[4] it is virtually identical to Federal Rule of Procedure 15(c). Those rules are broad and accordingly any type of amendment meeting the criteria of the rules, as in the instant case, relates back to the original pleading.

Respondents Mayer and Cie and Mayer Rothkopf Industries, Inc. make much of the jurisdictional allegations contained in the Third Amended Complaint.[5] The statement by Respondents that " . . . the District Court of Appeal found that the Third Amended Complaint contained no allegations which could have ever brought the Defendants within the court's jurisdiction"[6] is totally

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[4]Florida Rule of Civil Procedure 1.190(c).

[5]The Third Amended Complaint (at Appendix M of the Petition) is the original complaint for the purpose of this appeal, as set forth more fully in the Petition for Writ of Certiorari.

[6]Brief of Respondents at 21, 22.

false. The court did not say any such thing, as a review of the court's decision[7] will show.

Respondents would have this court believe that the Third Amended Complaint was lacking in some type of required jurisdictional allegation. In support of that contention, the Respondents, in addition to making the misstatement referred to above, have quoted the trial court during the hearing on Respondents' Motion for Summary Judgement, wherein the court stated "the problem is, your Complaint does not set up any jurisdiction for anybody, . . . ".[8]

Florida Rule of Civil Procedure 1.110, which dictates what allegations a complaint must contain, requires only one jurisdictional allegation, and that is only ". . . a short and plain statement of the grounds upon which the court's jurisdiction depends . . . ".[9] This requirement was met by paragraph one of the Third Amended Complaint.[10] That the trial court was under the mistaken impression that there were some jurisdictional allegations required and not contained in the Third Amended

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[7]Contained in Appendix K of the Petition for Writ of Certiorari.

[8]Brief of Respondents at 24; Appendix G at G-6 of the Appendix to the Petition for Writ of Certiorari.

[9]It is important to note that this required allegation pertains to the *court's* jurisdiction, and not personal jurisdiction over a defendant. Allegations to support personal jurisdiction are not required, although, if included, they may be helpful in resisting a motion to quash service of process.

[10]At Appendix M-2 of Appendix to Petition for Writ of Certiorari.

Complaint cannot support the decision of the District Court, nor can it support the contentions of Respondents.

Respondents cite two Florida cases, *Klosenski vs. Flaherty*, 116 So.2d 767 (Fla. 1959) and *Clark vs. Realty Investment Center, Inc.*, 252 So.2d 589 (Fla. 3d DCA 1971) in support of their position with regard to the merits. Respondents claim that "[t]he facts at bar are analogous to a situation wherein the Complaint does not present a factual basis for service by publication on a non-resident defendant. In those case (sic), there is no jurisdiction to proceed in the case and, in effect, as to the non-resident defendants the cause of action is a nullity."[11] Not only do neither of those cases anywhere state that a cause of action is a nullity where the Complaint does not present a factual basis for service by publication,[12] those cases in no way support Respondents' position.

Clark vs. Realty Investment Center, Inc., supra, in no way dealt with a statute of limitations issue. Rather, it merely stands for the unremarkable proposition that when service is attempted under a method different from that provided for by statute, service is properly quashed.

Klosenski vs. Flaherty, supra, at 769, 770, however, did deal with the statute of limitations issue. In that

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[11]Brief of Respondents at 22.

[12]Contrary to the intimations of Respondents, the defendant in *Klosenski* had not been served by publication. In the instant case the defendants were served by substituted service.

case the Florida Supreme Court recognized that ". . . the statute of limitations is tolled by the filing of the Complaint in a civil action." It is suggested that the ironical reliance by Respondents on this case, which is entirely contrary to their position, and instead fully supports Petitioner's position, underscores the frivolous position taken by Respondents.

Respondents claim that the most analogous case to the instant case is *Lillibridge vs. Riley*, 316 F.2d 232 (5th Cir. 1963) and cite as similar *Osman vs. Draskovich*, 314 F.Sup. 1115 (E.D. Wisc. 1970).

Those cases are clearly inapplicable to the instant case. This is because those cases deal with causes of action that had been *dismissed* thereby necessitating the reinstitution or refiling of a new lawsuit. Significantly, the instant case was never dismissed; only service of process was quashed. The filing of the Fourth Amended Complaint was in no manner a reinstitution of the action.

Respondents Mayer and Cie and Mayer Rothkopf Industries, Inc. have offered this court neither authority nor logic to support the decision of the District Court of Appeal. It is suggested that this is because the decision below cannot be so supported.

CONCLUSION

For the reasons and upon the authorities cited above and in the Petition for Writ of Certiorari, it is respectfully suggested that the Petition for Certiorari should be granted and it is prayed that the Writ of Certiorari be issued and the judgement below summarily reversed.

Respectfully submitted,

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February 1984